

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1730

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITIZENS FOR BALANCED ENVIRONMENT
AND TRANSPORTATION, INC., successor
in interest of Committee to Stop
Route 7, et al,

Plaintiffs-Appellants

v.

JOHN A. VOLPE, et al,

Defendants-Appellees

CIVIL APPEAL
DOCKET NO. 74-1730

On Appeal from
District Court of
Connecticut,
Newman J.,
Docket 15,054

APPELLEES' APPENDIX

July 12, 1974

OF COUNSEL:

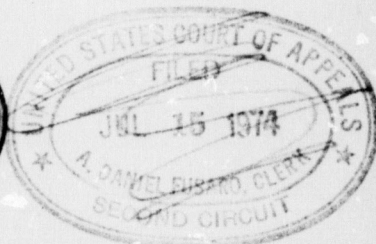
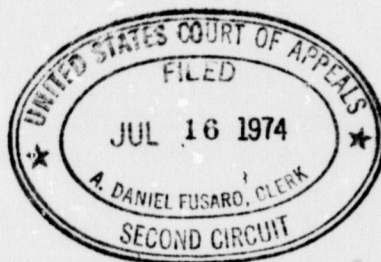
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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CITIZENS FOR BALANCED ENVIRONMENT)
AND TRANSPORTATION, INC., successor)
In interest of Committee to Stop)
Route 7, et al)

Plaintiffs)

v.)

VOLPE, et al)

Defendants)

AFFIDAVIT

CIVIL ACTION NO. 15,054

I, Lester P. Lamm, being duly sworn, depose and say:

1. I am the Assistant Federal Highway Administrator and Executive Director of the Federal Highway Administration.

2. I have read the annexed affidavit of A. J. Siccardi, Division Engineer for the Connecticut Division of the Federal Highway Administration, Department of Transportation, and can state that his affidavit correctly sets forth the position of the Federal Highway Administration with regard to the proposed reconstruction of Route 7 north of Interstate Route 84 through Brookfield and on to New Milford, Connecticut.

3. The Secretary of Transportation has, with certain reservations not germane here, delegated the authority for administering the Federal-aid highway laws in the State of Connecticut to the Federal Highway Administrator, who, in turn, has redelegated his authority to the Regional Administrator, who has redelegated same to the Division Engineer. [49 C.F.R. 1.48; 23 C.F.R. 1.37; FHWA Order 1-1 (chg. 35) issued May 15, 1973. (copies attached)]

4. The highway project north of I-84 is not to be a Federal project, nor a part of a Federal project by the Federal Highway Administration. It is a project, financed wholly without Federal funds, now proceeding to the construction stage without Federal approval. There has been no Federal connection that would require the filing of an environmental impact statement under the National Environmental Policy Act, which becomes operative when any major Federal action is taken. It is my view that there has been no Federal action to date which would require the State of Connecticut to conform to NEPA requirements in the construction of the Danbury to New Milford projects.

5. As Mr. Siccardi has attested, the segments from Norwalk to Danbury and from Danbury to New Milford serve essentially different traffic functions and needs. FHWA would therefore regard the preparation of an environmental impact statement for the southern segment only as being a due and proper observance of NEPA requirements and the Federal Highway Administration's regulation implementing it since the definition of a highway section in PPM 90-1 has a distinct application to the Norwalk-Danbury segment.

The Federal actions that have been suggested by the Plaintiffs in this case as providing a basis for making the project north of I-84 running to New Milford subject to Federal requirements have never been considered by the Federal Highway Administration as reflecting a sufficient nexus between Federal and State action to constitute a Federal action which would require compliance with NEPA.

6. The system action taken in 1969 to reflect the proposed relocation of the route north to New Milford was merely a general system configuration approval; it was not a specific location approval, it was not an approval of "...a program or programs of proposed projects. . ." pursuant to 23 U.S.C. 105, and it did not serve to release or authorize Federal funds for either the purchase of land or the construction of a highway in the area which is the subject of this suit. Although this approval is an essential step in the process leading to the future eligibility of a project for Federal funding, it does not signify, by itself, any intention by the State to seek Federal financing for a particular project, nor does it signify any commitment by the Federal Government with regard to a particular project. Very many roads on the system have been built without Federal aid and very many will continue to be so built. Many proposed roads on the system will never be built at all. The existing Route 7 has long been on the Federal-aid system, and system action reflecting change is a normal step consistent with the State's intentions to construct the highway without seeking Federal aid.

7. The use of planning and research funds by CONNDOT on part of this route is wholly consistent with the State's resolution to seek no Federal funding on the highway project itself. This is often done. An application for planning funds is wholly independent of the Federal-State partnership on a particular highway project. Approving a request for planning funds does not commit the Federal Government in any way to participate in a

particular highway project, and does not bind FHWA to approve proposed projects based on planning reports developed, and it is not an approval of the propriety of any project coming from that planning.

Federal-aid highway planning and research funds are made available to the State highway agencies under 23 U.S.C. 307(c). They are used for highway and local-public transportation planning on a State-wide basis, both on and off the Federal-aid systems. The States submit to FHWA for approval an annual highway planning and research program listing the planning activities (inventory, mapping, traffic counting, etc.) to be financed with HP&R funds. These planning activities are broad in scope and, generally, not project oriented. The projects coming from such planning processes are not subject to Federal review, unless subsequent Federal approvals are specifically sought.

8. The fact that there have been corridor and design hearings held by CONNDOT for proposed projects north of the I-84 Interchange provides no basis for applying NEPA. NEPA applies if there has been some Federal action, and no action in the form of approval of location or design has taken place here. Although the public hearings may have conformed to the procedures outlined for public hearings in FHWA PPM 20-8 and succeeding regulations of the Federal Highway Administration, the demonstration of this would not be sufficient to establish a Federal action. The unilateral observance by the State of Connecticut of hearing requirements which mirror Federal requirements, for whatever purpose, without a reciprocal Federal commitment in the form of some approval is not sufficient to

constitute a Federal action in our view, and the statutory language of NEPA would preclude application in such circumstances. A contrary interpretation by us would discourage State hearings where State policy might militate in favor of holding them.

9. The Route I-84, Route 7 Interchange, constructed in 1962-1963 with participating Federal funds was constructed essentially as part of I-84. It connected I-84 with the existing Route 7, northward, and was made compatible with a proposed relocated Route 7. The primary purpose of the establishment of the Route I-84 Interchange was to serve existing Route 7 traffic. The additional spur to the proposed route north was to prevent future disruption of I-84 in the event that Route 7 was eventually to be reconstructed to present-day highway standards. This 1962 construction was not a Federal action that triggers a need for complying with the National Environmental Policy Act of 1970. Funding the interchange can not be held to be determinative of an issue that did not arise until seven years later. The Interchange does not affect the State's right to proceed to construct the route north from I-84 to New Milford without Federal funding.

10. Although we expect and desire that each State will construct each of its projects with due regard for the environment, the statutory scheme for administering the Federal-aid highway program has not been so dominating and pervasive that mere tangential connections rigidly limit the State in its operations for all time. To the contrary, the Federal-State relationship in the statutory scheme has allowed the State, as initiator, executor, and maintainer of highway projects, fairly wide latitude and discretion. We believe this has been essential

in achieving most of the goals of the Federal-aid highway program. Although there are instances where FHWA could have wished to adopt a more directive approach, it nevertheless, had to consider that the reach of Federal law has its limits. See 23 U.S.C. 145.

11. It is the Federal Highway Administration's position that no Federal actions were taken with respect to the project north of I-84 to New Milford which would make the National Environmental Policy Act applicable to it. The Federal Highway Administration would not, in the normal course of administering its programs in the State of Connecticut, have been required to make a determination that NEPA required the preparation of an EIS for the northern segment of the Norwalk to New Milford highway. None of its procedures would suggest such a need in this case.

Lester P. Lamm /s/
Lester P. Lamm
Executive Director

Sworn to before me this 28th day of February, 1974.

Frances V. Seal /s/ My commission expires May 31, 1977.
Notary Public

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CITIZENS FOR BALANCED ENVIRONMENT :
AND TRANSPORTATION, INC., successor :
in interest of Committee to Stop :
Route 7, et al :

Plaintiffs :

v. :

VOLPE, et al :

Defendants :

AFFIDAVIT

CIVIL ACTION NO. 15,054

A. J. Siccardi, being duly sworn, deposes and says:

1. I am the Division Engineer for the Connecticut Division of the Federal Highway Administration (FHWA), Department of Transportation (DOT). I have held the position of FHWA Division Engineer since June 26, 1971. I am a Registered Professional Engineer in the States of New York and Colorado.

2. As Division Engineer I am familiar with the State of Connecticut's proposed reconstruction of Route 7 north of Interstate Route I-84 through Brookfield and on to New Milford.

3. The highway project north of I-84 is neither a Federal project nor part of a Federal project. It is financed wholly without federal funds and is proceeding without federal approval, nor is federal approval required. Since no federal action is required, the term "major Federal actions" as used in the National Environmental Policy Act of 1969 (NEPA) has no application

to such projects. I am therefore of the opinion that an environmental impact statement is not required.

4. In concluding that the State funded portion of Route 7 does not come within the purview of NEPA, I have also taken into consideration the following facts and circumstances:

a. Although CONNDOT is mandated by its legislature to reconstruct Route 7 from Norwalk to New Milford, the section between Norwalk and Danbury, to be constructed partly with federal funds serves essentially different functions than the section from Danbury or I-84 north to New Milford. This was pointed out both by the testimony and December 13, 1973 affidavit of George S. Koch, State of Connecticut Deputy Transportation Commissioner. Paragraphs 7 and 8 of that affidavit point out that these two lengths of highway serve almost entirely different traffic needs.

b. The only relation the portion of Route 7 north of I-84 has with Federal action is that it is on the federal-aid primary system. Although a system change was made in 1969, this in no way commits FHWA to federal funding or federal approval of the construction of this length of highway. This system is provided for in 23 U.S.C. § 103(b) (as amended by § 148 of P.L. 93-87) and further described in 23 C.F.R. § 1.6. Systems are further discussed in paragraph 6 hereof.

c. All of the federal-aid systems in all States were recently studied as part of a systems reclassification study mandated by Congress. On April 21, 1972 an environmental impact statement, together with

comments from other agencies which dealt with the federal-aid highway systems and the reclassification study, was forwarded to the Speaker of the House and the President of the Senate together with a proposed 1972 Highway Act by Secretary of Transportation John A. Volpe. A copy of this EIS and a copy of PPM 10-1 dealing with federal-aid highway systems are attached as Exhibits 1 and 2.

d. As a condition to federal funding, program approval is required by 23 U.S.C. § 105 and 23 C.F.R. § 1.8. CONNDOT has never requested FHWA to program any portion of Route 7 north of the I-84 interchange for federal funding except as noted in paragraphs g and h below. To the contrary, CONNDOT as early as 1965 indicated that this segment of highway would be reconstructed entirely with State funds. See Exhibit 3. I have, therefore, never expected nor had reason to expect that CONNDOT would seek federal funding for reconstruction of Route 7 north of the Route I-84 interchange. This demonstrates that CONNDOT's decision was based entirely on the funding available. This decision, could not have been an effort to avoid federal requirements, since the National Environmental Policy Act was not passed until January, 1970.

e. CONNDOT has never asked for federal location or design approval for the proposed construction of Route 7 north of the I-84 interchange. Since some of the corridor and design hearings held by CONNDOT for proposed projects north of the I-84 interchange are more than three years old, pursuant to 23 C.F.R. Part 790.5(d) (formerly PPM 20-8), these hearings may or may not be timely and a new hearing or hearings,

or at least the opportunity for such hearings, would be required before federal design approval could be given. (Exhibit 4).

f. Since CONNDOT has advertised for bids for a project north of the I-84 interchange without getting federal approvals, including authorization to proceed, federal funds can not participate in that project. See 23 C.F.R. §§ 1.12 and 1.9.

g. The use of federal planning and research funds north of the I-84 interchange by CONNDOT did not commit the federal government in any way to participate in a highway project and did not mean that FHWA would be bound to approve proposed projects based on the planning reports developed pursuant to such funding.

h. The Route I-84--Route 7 interchange was constructed in 1962 essentially as part of the Route I-84 construction to prevent future disruption of I-84 should Route 7 eventually be reconstructed to present day highway standards. I do not regard this 1962 construction as making the future proposed construction to the north "federal" or requiring CONNDOT to meet federal requirements for construction to the north with 100% State funding. Section 123 of the Federal-aid Highway Act of 1973, P.L. 93-87, 23 U.S.C. § 145 which provides that it is up to the States to determine what projects will be federally funded and, therefore, must meet federal requirements is statutory recognition of a Federal Highway Administration policy of long standing.

Therefore, the operation of these lengths of highway into federal and non-federal lengths is logical.

5. Even if a portion of Route 7 north of Route I-84 were federally funded, it would be logical pursuant to the procedures set out in PPM 90-1 to have two separate EIS's, one from Norwalk to Danbury and one from Danbury to some other point north of Danbury. This is so because the two highway lengths serve different traffic needs and would have different social, economic and environmental affects.

6. The following is a brief synopsis of system and location approval requirements:

The purpose of establishing highway systems is to provide a means of defining the extent and characteristics of available and proposed highway facilities. The classification of the highways into integrated systems provides a stable frame work for planning, financing and executing long range programs on an efficient economic and consistent basis to meet essential traffic needs and to promote the general welfare. The mileage of the Primary System in each State is limited by Section 103(b), Title 23, U.S.C.

The procedures for System Action Approval are quite general. The State Highway Agency has the responsibility for initiating route selections and proposing changes in routes already designated. The system action includes a brief description of the route, a map and a discussion as to why the system action is required. An illustration of a typical route description is set out in an attachment to PPM 10-1 as follows:

From a point on FAP Route 43 north of Sanford via Chapel Hill and Durham to a point on FAP Route 74 in Roxboro, and from another point on FAP Route 74 in Roxboro to the North Carolina-Virginia State line enroute to South Boston with a loop at Chapel Hill and a spur from south of Durham to FAY Route 84 west of Durham.

The maps are usually of a small scale of about 1 inch equals a mile. They are usually of sufficient scale to show the proposed system change but are not of adequate scale to show detailed location.

No Federal-aid primary funds can be expended on a highway project unless the project is on the approved Federal-aid primary system.

It can be seen from the above that the System Action only establishes a system upon which the State Highway Agency may request the utilization of Federal-aid funds.

Location approval is a much more specific action which designates a specific location on which detailed design will be developed.

In order to obtain location approval the State Highway Agencies request must include a study report containing the following information:

- a. Descriptions of the alternatives considered and a discussion of the anticipated social, economic, and environmental effects of the alternatives, pointing out the significant differences and the reasons supporting the proposed location or design. In addition, the report must include an analysis of the relative consistency of the alternatives with the goals and objectives of any urban plan that has been adopted by the community concerned.
- b. Location study reports must describe the termini, the general type of facility, the nature of the service which the highway is intended to provide, and other major features of the alternatives.
- c. Appropriate maps or drawings of the location for which approval is requested. Generally these maps are of a scale of at least 1 inch equals 200 feet.

d. A summary and analysis of the views received concerning the proposed undertaking.

e. A list of any prior studies relevant to the undertaking.

In addition to the above a request for location approval for a project to be financed with Federal-aid funds also requires that there must have been an opportunity for a public hearing, and the requirements of the National Environmental Policy Act must have been satisfied.

It can be seen that the requirements for getting location approval are much more detailed than the requirements for system action approval.

A. J. Siccardi /s/

A. J. Siccardi
Division Engineer

Subscribed and sworn to before me this 13th day of February, 1974.

Theodora E. Pease /s/

Theodora E. Pease
Notary Public

My commission expires March 31, 1978

AFFIDAVIT OF JAMES C. SPENCER
RE: HIGHWAY PROJECTS 34-124 and 18-95 - RELOCATION OF ROUTE 7
DANBURY-BROOKFIELD - HYDRAULICS

JAMES C. SPENCER, being duly sworn, deposes and states that:

1. I am Chief of the Hydraulics and Drainage Section of the Bureau of Highways, Connecticut Department of Transportation. I am a graduate of Trinity College with a B.S. in Civil Engineering and possess a Professional Engineer's license in Connecticut.
2. I am familiar with the hydraulic design for project 34-124 and I do not believe that the construction of this portion of Route 7 will have a significant effect on the flood plain of the Still River. At several locations dry (raised) channels and low flow culverts have been designed so as to maintain low river flows in by-passed sections of the Still River. In instances where the proposed relocated Still River channel crosses a meandering portion of the existing river, the relocated channel will be raised from two (2) to three (3) feet so that the low flows will continue in the by-passed channel section. During periods of increased river flow, the river will rise so as to exceed this 2 to 3 foot depth and then flow will continue simultaneously in both channels. Where the river will be relocated such that the existing channel is on the opposite side of the highway fill, culverts have been designed to convey the low flows to the existing river channel and during greater flows, both channels will be utilized for the river.
3. It is estimated that for the design storm (100 year frequency), the average velocity of flow of the river due to the construction of Route 7 will be increased from 1.9 feet per second to 2.3 feet per second. This minor increase in velocity will not adversely affect properties north of the project.
4. The length of the existing Still River within this project is 5.57 miles and the resultant river length after completing the project will be 5.95 miles. The relocated portions of the river total a little less than two miles.

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5. In my opinion the highway encroachment on the Still River flood plain will not have a significant effect on the downstream flow.

6. The flood plain of the river will not be destroyed by this highway project. It is estimated that the flood plain area will be reduced by about 20% due to the highway filling. At the design storm (100 year frequency) the flood level in the flood plain will be within one (1) foot₊ of the level which would be reached under existing conditions. As a result of this project, the bulk of the existing flood plain will still be utilized during flood periods as a check valve.

7. The dissolved oxygen within this section of the Still River varies from 6.8 to 2.3 (in the A.M.) and 7.3 to 5.0 (in the P.M.) as shown in fig 28 of "Water Resources of Connecticut, part 6 - Upper Housatonic River Basin by U. S. G. S." This diminuation of oxygen content indicates that this section of the river is not acting as a pollution filter. This project will not adversely affect the oxygen content of the river.

8. The hydraulic designs on this project have been approved by the Department of Environmental Protection.

9. In my opinion, the work scheduled by the contractor (D'Addario - O&G) between now and November 1, 1974 will not have a significant affect on the Still River or its flood plain. I understand that during this period, the contractor plans to remove about 400,000 yards of rock from project 18-95 just north of project 34-124. This pervious fill material will be used as a base for the northerly one and a half (1.5₊) miles of Route 7 in project 34-124. This 400,000 yards of fill represents about 14% of the total fill required for this entire project.

James C. Spencer
JAMES C. SPENCER

Subscribed and sworn to before me this 19th day of June, 1974.

Theodore E. Pearce
THEODORE E. PEARCE
NOTARY PUBLIC

APPL 15 MY COMMISSION EXPIRES MARCH 31, 1976

STATE HIGHWAY DEPARTMENT
STATE OF CONNECTICUT
MEMORANDUM

SUBJECT: Redding-Brookfield
Relocation of US 7

34-34 34-124

DATE 11-5-65

TO

FROM

Mr. Robert G. Mitchell

NAME

Ralph L. Hager

Please undertake the preliminary engineering and acquisition of required property in order that contracts for construction may be advertised for the following projects (sections):

Program ----- Construction
Function ----- 556.006

SECTION #1

Description ----- Relocation of US 7 in Redding and Danbury from 0.4+ mile south of the Redding-Danbury town line in Redding northerly to the vicinity of the west junction of US 7 with I-84 in Danbury, a length of approximately 4.0 miles.

Estimated Cost ----- Preliminary Engineering \$ 500,000
Right of Way 1,500,000
Construction, Util. and Const. Eng. 7,500,000
Total Estimated Cost \$9,500,000

It is proposed that Section #1 be advertised in the late Spring of 1969.

SECTION #2

Description ----- Relocation of US 7 in Danbury and Brookfield from the vicinity of the east junction of US 7 with I-84 in Danbury northerly to north of Silvermine Road in Brookfield, a length of approximately 4.1 miles.

Estimated Cost ----- Preliminary Engineering \$ 500,000
Right of Way 1,500,000
Construction, Util. and Const. Eng. 8,000,000
Total Estimated Cost \$10,000,000

It is proposed that Section #2 be advertised in the Fall of 1969.

These projects were part of a project initiation dated 6-5-57 under a prior appropriation. All previous costs should remain as coded and new project numbers should be established for each section.

It is proposed that these projects be undertaken without federal participation.

For each section, the survey and design will be undertaken by Contracting Engineers.

Recommended for Approval:

Robert G. Mitchell
Chief Engineer

11/8/65
Date

R. L. Hager

JWH:aa

Copy: Commissioner Ives

Mr. R. L. Hager

Mr. A. E. Wood

Mr. E. T. McGrath

Mr. A. C. England

Mr. D. S. Johnson

Mr. R. M. Williston (3)

Mr. F. P. Hogan

Mr. J. Garbus (2)

Mr. T. H. Sellew

Mr. F. J. Thompson (3)

Mr. L. J. Conaty, Dist. 3

Mr. R. L. Booth (2)

Mr. N. Wayne (FAPR-NIS)

Mr. H. L. Azarigian

Mr. T. Yasensky

Mr. I. Resnikoff (3)

Mr. E. J. Gray

Mr. H. T. Davidson

Mr. C. G. Mellen

Mr. H. E. Ginter

Mr. S. L. Allen

Mr. S. O. Lunden

Mr. W. J. Hoddinott

Mr. L. G. Noyes (2)

Mr. M. L. Gatti

Central Files

APP 16